

# **PROGRESS REPORT**

## **Comm 47 CODE ADVISORY COMMITTEE**

DATE: Wednesday, November 13, 2002

TIME: 9:00 a.m. – 3:00 p.m.

LOCATION: Tommy G. Thompson Commerce Center, Room 3B  
201 West Washington Avenue  
Madison, Wisconsin

### COMMITTEE MEMBER ATTENDANCE:

Dave Blatnik	Absent	Kevin Olson	P
Richard Blatter (Erin Roth)	Present	Robert Pearson	P
Tim Clay	P	Boyd Possin	P
Sean Dilweg	P	Tom Reinsch	P
Scott Hafner	A	Dick VanGrinsven	A
David Havick	A	Scott Wilson	A
George Marek	A	Wendell Wojner	P
Mark Maten	P		

### GUESTS:

Kendra Bonderud – Legislative Fiscal Bureau	Steve Oseseck – Envirogen
Ray de Long – REI	Jodie Peotter – ATC Associates
Walt Ebersohl – Wis. Dept. of Natural Resources	Raghu Singh – OM Enterprises
Gary Henningsen – Northern Environmental	Mark Tusler – BT <sup>2</sup>
Jerry Jones – US Bank	Tim Wimmer – Sigma

### DEPARTMENT OF COMMERCE STAFF:

Cathy Cliff	Dennis Legler
Lori Huntoon	Sam Rockweiler

Dennis Legler opened the meeting with a review of the agenda, and the Committee accepted the previous meeting's progress report.

### **Timely claim submittals**

Dennis explained that the current milestones for when a claim submittal is required or permitted are inadequate because too many claims are not submitted in a timely manner, which results in excessive interest costs to the PECFA fund. Kevin Olson suggested requiring a claim submittal within a set number of days after completing each major phase at a site, or after a set time period, or after reaching a cap limit. Boyd Possin raised concern for being required to submit a claim after reaching a cap that occurs in the middle of a major phase. Cathy Cliff suggested linking a claim submittal requirement to when consultants submit bills to responsible parties, such as occurs at the end of various phases.

Boyd referenced the statutory provision that disallows reimbursing subsequent interest costs if a site investigation is not completed within five years. Dennis said this provision is interpreted as disallowing interest costs for not only the investigation but the remediation as well.

Tom Reinsch suggested requiring annual claim submittals. Kevin said the statutory annual consultant reports could be required to include submittal of any substantial claims, such as those over \$20,000. Boyd commented if any of those claims could not be submitted, the consultant could be required to explain why, and Kevin added that the Department's response to the explanation could be to disallow all interest incurred after a subsequent, specified grace period. Tim Clay said the disallowance of interest might be applied to only the project phase at issue.

Gary Henningsen suggested having a claim submitted whenever a responsible party switches to a different consultant, but Robert Pearson said this submittal should not be mandatory. Mark Maten said if a responsible party discharges a consultant without paying for services, consultants are entitled to withhold the corresponding data. Dennis commented that any corresponding data which has been paid for should not be withheld. Kevin noted the Department can exercise its authority to have consultants make records of PECFA services available for inspection. Dennis added that an eligible cost of \$500 for preparing a claim submittal is not counted when determining whether a cap is exceeded, and suggested requiring claim submittal whenever a change in responsible party occurs.

Jerry Jones indicated additional requirements for timely claim submittals could be helpful for responsible parties who are tied to consultants who are not performing in a timely manner. Due to the long lead time for having code changes become effective, Boyd recommended also exploring other avenues for improving the timeliness of claim submittals, such as letters from the Department that disallow subsequent interest if claims are not submitted within an announced 120-day limit. Mark suggested informing responsible parties that claims can be prepared by someone other than the associated consultant. Kevin said responsible parties often want to submit claims but cannot because consultants have withheld the data. Dennis agreed and said

responsible parties are then informed to submit what they have, and the Department then contacts the consultants accordingly. Dennis explained that more of these problem sites should be identified in new reports that are being collected from lenders, consultants, and responsible parties.

Mark recommended that in the event a consultant is disqualified from further participation in the PECFA program, the affected clients should be so informed.

The Committee favored simply requiring submittal of a claim at milestones of every \$50,000 or 12 months, whichever comes first. Dennis recommended not allowing more than two submittals per year.

### **Third party claims**

Dennis explained that damages to third parties generally are billed to responsible parties, and then submitted as claims to the PECFA program. Mark described an example of a public sidewalk being damaged on an adjoining property, and said a claim should be allowed for the replacement cost, rather than a depreciated cost, since the third party has no other choice than to replace the walk.

Kevin agreed damages to third parties should be covered at 100 percent of the cost, including replacement of concrete or asphalt. Boyd said costs for pavement should be reimbursed if paving is the cheapest route to closure. Boyd asked whether repair of ruts from operating a drill rig on an adjoining property is reimbursable, and Dennis said no landscaping is reimbursable.

Robert Pearson argued that excavation and disposal of contaminated soil from road right-of-ways that is directly linked to an open or closed PECFA site should be reimbursed 100 percent.

Mark said third parties should be reimbursed directly rather than through a responsible party.

Cathy invited submittal of any further comments on the topic, and Dennis said further internal discussions would follow.

### **Disposal of remedial equipment**

Kevin noted the current process is inefficient for disposing of remedial equipment after site closure, and sometimes results in warehousing the equipment until it can be given to another responsible party who can use it. According to Kevin, the current prohibition against consultants providing commodity services prevents efficiencies such as a consultant furnishing trailer-mounted vapor extraction equipment that can be readily moved from site to site. Kevin added that allowing consultants to own the equipment instead of the Department would result in any repairs being covered by the consultant rather than billed to the Department.

Mark commented that responsible parties do not want to be left with dismantling remedial equipment.

Dennis indicated rule revisions should include authorizing consultants to own and reuse the equipment and to provide commodity services, such as at sites with public bidding. Dennis and Kevin agreed the current requirement to simply sell the equipment and return the funds to the PECFA program after site closure should be modified.

## **Credentials**

In referring to the draft rules that were circulated prior to the meeting, Dennis explained that the credentialing requirements in Comm 47 are proposed to be consolidated with the corresponding Department-wide credentialing requirements in Comm 5. According to Dennis, the consolidation includes expanding beyond the current practice of simply registering every consultant who applies, to establishing the minimum qualifications, examination criteria, and responsibilities for Certified PECFA Project Managers. A CPPM would then be required to provide oversight and accountability for every PECFA project. Dennis said this would provide more control, beginning early on in a project, instead of the Department belatedly applying controls after claims are submitted.

Boyd asked whether a CPPM would also have to be a registered consultant, and Dennis said the CPPM qualifications would include those that are held by a consultant.

Mark asked what would happen to a CPPM's projects if a certification is suspended or revoked. Cathy explained that the data the Department currently collects includes linking consultants to responsible parties, which could be used to inform affected RPs of a suspension or revocation.

Tom Reinsch and Erin Roth said having an ability to levy fines would be effective, but Cathy noted that due to statutory limits on the Department's authority, fines are currently levied only during enforcement actions which are processed through the Department of Justice.

Dennis described his preference for having generalized discretion to suspend or revoke credentials, as Comm 5 currently provides for other credentials issued by the Department. The Committee agreed that grounds for revocation should include fraudulent PECFA actions by a CPPM.

Boyd recommended expanding the Comm 5.80 list of services performed by PECFA consulting firms to include submitting bids in the public bidding process.

There was support for the proposal in the draft rules to base the CPPM credential on passing a written examination after demonstrating either the prescribed amount of experience related to the PECFA program, or the prescribed combination of experience and academic achievement.

There also was interest in expanding the draft rules to reference the associated requirements in chapters 443 and 470 of the Wisconsin Statutes for registered Professional Engineers, Geologists, Hydrologists, and Soil Scientists. Kevin said a CPPM applicant should have one of those registrations rather than one of the academic degrees listed in the proposed rules, and that the qualifying experience should be limited to the proposed amount of experience as a registered PECFA consultant. Lori Huntoon recommended that registration as a PECFA consulting firm be limited to firms which are registered under chapter 473 to practice professional geology.

## **Insurance**

Dennis noted that submitted PECFA claims are required to include insurance certificates showing the insurance coverage prescribed in Comm 47 for consultants, laboratories, and drillers. However, the certificates do not reveal where the insurance is subsequently discontinued due to the premiums no longer being paid.

Mark explained consultants may not be able to obtain insurance policies that remain in effect for a specified period after the premiums stop being paid, because renewal periods typically are just for one year. Mark described how “claims made” insurance policies cover damage claims that are filed only while the coverage is in effect; whereas several years ago, “occurrence” policies were more readily available that covered damages which occurred while the coverage was in effect, regardless of when the claim was filed. According to Mark, any occurrence policies that may be available for PECFA projects now would likely be prohibitively expensive.

Dennis reported the submitted insurance certificates have grown to become a database that the Department could further refine and use as a substitute for having to receive many of the certificates in the future, provided policy renewals are submitted as needed to document any required ongoing coverage. The Committee agreed the Department should pursue the concept.

Mark commented that any subcontractors who are billing responsible parties directly for services may be operating without PECFA-related insurance. Mark and Kevin noted Comm 47 does not require the insurance for contractors, and questioned whether the insurance is really needed for laboratories. Kevin said his firm requires the insurance for contractors, such as excavators, and suggested that Comm 47 should as well. However, Tom Reinsch explained that requiring contractor insurance in Comm 47 had been rejected previously because it would limit the work to only the few who would purchase the insurance, and thereby impose excessive costs on the PECFA program. Tom added that environmental risks are much greater with drillers than with contractors.

Tom suggested expanding individual insurance policies to also list responsible parties and the Department as insured parties, which could result in the policy renewals being automatically sent to the PECFA program.

### **Status of the bidding rules**

Dennis reported that the draft rules for remediation bidding are somewhat on hold while the Department explores use of regional service providers on all new sites, and he noted that meetings would be held with staff from the Department of Natural Resources within the next month to further develop the concept. According to Dennis, the regional service providers could be selected through a competitive bidding process, and would enable the Department to better manage the financial aspects of the PECFA program, starting early on at individual sites. Dennis added that effective use of remediation bidding and regional service providers could avoid both the current requirement to bid commodity services and the accompanying restriction against consultants providing commodity services.

Tom questioned whether the Committee is wasting too much time discussing ideas and proposals that are then discarded or not used. Dennis urged patience, emphasizing that the Department needs to obtain a better understanding of individual sites early on in order to prioritize commitment of PECFA's limited resources, and he reiterated that preventing the PECFA fund from becoming bankrupt will involve more than looking only at changes for new sites.

*Submitted by Sam Rockweiler, code consultant to the Committee*  
*File Reference: Comm 47/progress report 6*